

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROBERT PETE GOMEZ,
Defendant.

No. CR-04-2126-FVS

**FINDINGS, CONCLUSIONS AND
ORDER ON OBJECTIONS**

THIS MATTER came before the Court on July 28, 2005, for sentencing of the Defendant following his conviction FOR Possession of a Firearm by Prohibited Person, in violation of 18 U.S.C. §922(g)(1). The defendant appeared in person and with his attorney, Aaron Dalan. The government was represented by Robert Ellis, Assistant United States Attorney. This Order is intended to memorialize the Court's oral ruling made in open court concerning the Defendant's objection to the application of the Armed Career Criminal enhancement to his sentence.

Title 18 U.S.C. § 924(e), known as the Armed Career Criminal Act (ACCA), mandates a 15-year minimum prison term for persons who violate 18 U.S.C. § 922(g)(1) by possessing a firearm and have three prior convictions for "violent felonies." *Shepard v. United States*, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005). The Presentence Report (PSR) recommends the Defendant qualifies for an enhanced sentence

1 under the ACCA because he has three or more prior convictions for
2 crimes of violence. The four convictions proffered include:
3 (1) 1996 residential burglary; (2) 1997 second-degree assault;
4 (3) 2000 second-degree assault; and (4) 2000 intimidating a witness.
5 The Defendant concedes that his 1997 and 2000 convictions for second-
6 degree assault constitute crimes of violence. The Government
7 concedes that the Defendant's 2000 conviction for intimidating a
8 witness is not a crime of violence because of the extremely broad
9 definition of "threat" found in RCW 9A.01.110(25). The Court
10 concurs. Therefore, the determination of whether the Defendant
11 qualifies for the ACCA enhancement turns on whether his prior state
12 conviction for residential burglary qualifies as a "violent felony."

13 The Defendant contends his prior state conviction for
14 residential burglary can not serve as a predicate offense under the
15 ACCA for two reasons. First, the Defendant contends his conviction
16 was not, as required by 18 U.S.C. 924(e)(2)(B), an offense
17 "punishable by imprisonment for a term exceeding one year[.]"
18 Second, the Defendant argues the Government cannot prove his prior
19 state conviction for residential burglary satisfies the elements of
20 burglary for purposes of section 924(e)(2)(B).

21 Although the Washington statute criminalizing residential
22 burglary allows for a maximum punishment of ten years imprisonment,
23 the Defendant's standard sentencing range under the Washington
24 guidelines was 3 to 9 months. See RCW 9A.52.025(1) (categorizing
25 residential burglary as Class B Felony); see also RCW 9A.20.020(1)(b)
26 (stating maximum punishment for class B felony is 10 years). The

1 Defendant argues that after *Blakely v. Washington*, 542 U.S. 296, 125
2 S.Ct. 2531, 159 L.Ed.2d 403 (2004), to determine whether an offense
3 is "punishable" by a term of imprisonment exceeding one year, the
4 Court must look to the relevant standard sentencing range, not the
5 maximum sentence specified by statute. Together, *United States v.*
6 *Booker*, 125 S.Ct. 783 (2005) and *Blakely* require all facts forming
7 the basis of departure from a presumptive sentencing range to be
8 established by a jury, beyond a reasonable doubt, or admitted by the
9 defendant. Therefore, according to the Defendant, since the
10 statutory maximum sentence is the maximum sentence a judge may impose
11 without additional fact finding, a predicate crime under section
12 924(e) (2) (B) can only be determined by looking to the sentence
13 actually imposed on the individual based on the facts found and the
14 individual's criminal history.

15 The Defendant's argument is foreclosed by *United States v.*
16 *Moreno-Hernandez*, 2005 WL 1560269, at 8 (9th Cir. July 5, 2005)
17 (holding that *Blakely* could not have altered the defendant's "maximum
18 possible sentence at the time of his 1999 Oregon state conviction"
19 because *Blakely* was not in effect at that time). For purposes of
20 ascertaining whether a predicate offense constitutes a "felony" for
21 federal sentencing purposes, the Court is concerned only with the
22 maximum possible sentence at the time of the Defendant's prior
23 conviction. *Moreno-Hernandez*, 2005 WL 1560269, at 8. *Blakely* could
24 not have affected the Defendant's maximum possible sentence at the
25 time of his 1996 state conviction for residential burglary because
26 *Blakely* was not in effect at that time. Accordingly, the Court

1 determines the Defendant's prior state conviction for residential
2 burglary, which carried a maximum sentence of 10 years imprisonment
3 under the Washington statute of conviction, qualifies as a "crime
4 punishable by a term of imprisonment exceeding one year" under
5 section 924(e) (2) (B). Therefore, the only remaining issue is whether
6 the Defendant's state conviction for residential burglary satisfies
7 the elements of burglary under section 924(e) (2) (B) (ii).

8 Because the ACCA does not define burglary, in *Taylor v. United*
9 *States*, 495 U.S. 575, 599, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990),
10 the Supreme Court established a generic definition of burglary for
11 purposes of section 924(e) (2) (B): "unlawful or unprivileged entry
12 into, or remaining in a building or structure, with intent to commit
13 a crime." "A court generally must apply a categorical approach at
14 sentencing to determine whether a defendant was convicted of conduct
15 which included these elements of generic burglary. That is, it may
16 'look only to the fact of conviction and the statutory definition of
17 the prior offense.'" *United States v. Smith*, 390 F.3d 661, 663 (9th
18 Cir. 2004) (citing *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143).

19 The Government concedes that under the Taylor categorical
20 approach, a violation of Washington's residential burglary statute
21 does not constitute a "violent felony" for purposes of the ACCA
22 because the Washington statutory definition of residential burglary
23 is broader than that of the federal generic definition of burglary.
24 See *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003) (concluding
25 that residential burglary under Washington law does not meet the
26 generic definition of "burglary of a dwelling" under U.S.S.G.

1 § 4B1.2(a) (2) because under Washington law, a "dwelling" can include
2 a fenced area, a railway car, or a cargo container, but Taylor limits
3 burglary to buildings or other structures). The Government contends
4 the Court can find the Defendant's conviction satisfies the elements
5 of generic burglary under the modified categorical approach. See
6 *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d
7 607 (1990). In support of this argument the Government proffered the
8 Information, the Judgment on Plea of Guilty, and the Statement of
9 Defendant on Plea of Guilty.

10 Under the modified categorical approach, the Court conducts "a
11 limited examination of documents in the record of conviction to
12 determine if there is sufficient evidence to conclude that a
13 defendant was convicted of the elements of the generically defined
14 crime even though his or her statute was facially overinclusive."
15 *Wenner*, 351 F.3d at 972 (citations omitted). The Supreme Court
16 recently extended the modified categorical approach to cases resolved
17 by guilty pleas. See *Shepard*, 125 S.Ct. 1254. There the Supreme
18 Court held that "enquiry under the ACCA to determine whether a plea
19 of guilty to burglary defined by a nongeneric statute necessarily
20 admitted elements of the generic offense is limited to the terms of
21 the charging document, the terms of a plea agreement or transcript of
22 colloquy between judge and defendant in which the factual basis for
23 the plea was confirmed by the defendant, or to some comparable
24 judicial record of this information." *Shepard*, 125 S.Ct. at 1263.
25 The "government has the burden to establish clearly and unequivocally
26 that the conviction was based on all the elements of a qualifying

1 predicate offense." *United States v. Navidad-Marcos*, 367 F.3d 903,
2 908 (9th Cir. 2004).

3 Having reviewed the evidence, the Court finds the Government
4 satisfied its burden of demonstrating that the Defendant's conviction
5 for residential burglary satisfies the elements of generic burglary
6 as it is defined by the Guidelines and relevant case law. Here, the
7 Information charged the Defendant with burglarizing a "dwelling other
8 than a vehicle", specifically, "418 Liberty Avenue, Granger,
9 Washington, the residence of Curtis Willey". Although this satisfies
10 all of the elements of generic burglary, the Court may not rely on
11 the Information alone. *Wenner*, 351 F.3d at 974 (citing *United States*
12 *v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993) (holding that a
13 "sentencing court may not rely upon the charging paper alone in
14 determining if a prior jury conviction was for a 'violent felony.'")
15 and *United States v. Bonat*, 106 F.3d 1472, 1477 (9th Cir. 1997)
16 (stating that if district court had relied solely on charging
17 document, instead of also considering the Judgment on Plea of Guilty,
18 it would have been error)). However, the Court is permitted to rely
19 on the Information in conjunction with the Defendant's Statement on
20 Plea of Guilty and the Judgment on Plea of Guilty. The Court notes
21 that the cause number on the Information charging the Defendant with
22 residential burglary is the same cause number that is listed on both
23 the Judgment on Plea of Guilty and the Defendant's Statement on Plea
24 of Guilty. Further, the Court notes that the Defendant's Judgment
25 on Plea of Guilty indicates he was adjudged guilty of residential
26 burglary as charged in Count 1 of the Information. Since, the

1 Information on Count I charged the Defendant with burglarizing a
2 specific residence, the Court concludes that the Defendant
3 necessarily pled guilty to the specific offense outlined in the
4 Information. See *Bonat*, 106 F.3d at 1477-78. Therefore, the
5 Defendant pled guilty to the elements of generic burglary. The fact
6 that the Defendant entered a nolo contendere plea / Alford Plea is of
7 no consequence in assessing whether the conviction may be counted as
8 a predicate offense. *United States v. Smith*, 390 F.3d 661, 665 (9th
9 Cir. 2004), as amended 405 F.3d 726 (9th Cir. 2005).

10 The Government also wants the Court to rely on the fact that the
11 same agency number was referenced in the Judgment and the Indictment.
12 However, the Court did not consider this evidence in reaching its
13 determination because this would require the Court to look beyond the
14 acceptable judicial record. See *Shepard*, 125 S.Ct. at 1263. The
15 Court notes that the Government also submitted police records related
16 to the Defendant's residential burglary conviction. However, the
17 Court did not consider the police records. In determining whether
18 the Defendant's prior conviction for residential burglary qualified
19 as a predicate offense for purposes of the ACCA, the Court only
20 considered the Information, the Statement of Defendant on Plea of
21 Guilty, and the Judgment on Plea of Guilty.

22 For the reasons discussed above and on the record, the Court
23 concludes that the Defendant's prior state conviction for residential
24 burglary constitutes a crime of violence under the ACCA.
25 Accordingly, the Defendant's objection to the application of the ACCA
26 to his sentence is overruled.

//

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 4th day of August, 2005.

s/ Fred Van Sickle
Fred Van Sickle
United States District Judge